NO. 94087-8

SUPREME COURT OF THE STATE OF WASHINGTON

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS,
husband and wife,

Respondents,

v.

SHAMROCK PAVING, INC., a Washington corporation

Petitioner.

AMICUS CURIAE BRIEF OF STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

ROBERT W. FERGUSON
Attorney General

IVY M. ANDERSON
Assistant Attorney General
WSBA No. 30652
P.O. Box 40117
Olympia, WA 98504-0117
360-586-4619
OID No. 91024

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I. INTRODUCTION

The State of Washington, Department of Ecology submits this amicus curiae brief to address two issues before the Court. First, Ecology provides the Court with its position on the proper interpretation of the term "remedial action" under the Model Toxics Control Act (MTCA), RCW 70.105D. Second, Ecology clarifies that whether or not a "threat" or "potential threat" exists under MTCA cannot be determined by simple reference to Ecology's numeric cleanup levels, but instead can be a complex, site-specific determination.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

As MTCA's administrator, Ecology has regulatory authority over nearly all environmental cleanup sites in Washington. *See* RCW 70.105D.020(5), .030, .040(4), .050. At present, there are approximately 5,700 MTCA cleanup sites in Washington.[1] Ecology has a direct interest in the Court's construction of MTCA's "remedial action" definition, as that definition applies to thousands of cleanup sites in Washington. While this case involves an independent cleanup conducted without Ecology's supervision, the definition of "remedial action" applies to Ecology-conducted or Ecology-supervised cleanups as well. The term

[1] Data on file with the Department of Ecology Toxics Cleanup Program. This statistic includes sites that are confirmed or suspected by Ecology, where cleanup has already begun or where the site is still awaiting cleanup. This statistic is based on August 2017 Toxics Cleanup Program data.

"remedial action" is used throughout MTCA, with regulatory consequences attached to the term.[2] If the definition of "remedial action" is limited as argued by Petitioner Shamrock Paving, Inc., Ecology's regulatory authority may also be limited, particularly with respect to requiring investigative work to determine whether or not a release of hazardous substances poses a threat or potential threat to human health and the environment.

III. ISSUES ADDRESSED BY AMICUS CURIAE

1. Whether an investigation to fully characterize the extent of a hazardous substance and the range of concentrations present at a site is a "remedial action" under MTCA, or whether a narrower interpretation should be applied, under which an investigation is only a "remedial action" if the results indicate a hazardous substance is above a cleanup level.

2. Whether identification of a "potential threat" from a release of a hazardous substance should be a site-specific determination, or whether a "potential threat" is assumed when the concentration of the hazardous substance is below a numeric cleanup level, but above a nominal amount.

[2] The term "remedial action" is used approximately 76 times in RCW 70.105D.

IV. STATEMENT OF THE CASE

Ecology incorporates by reference the statement of facts provided in the Court of Appeals' opinion. *Douglass v. Shamrock Paving, Inc.*, 196 Wn. App. 849, 853–54, 384 P.3d 673 (2016).

V. ARGUMENT

This case involves a suit to recover remedial action costs under MTCA's private right of action, commonly known as a contribution claim. *See* RCW 70.105D.080. To prove a contribution claim, a plaintiff must show it meets the following elements: (1) the requesting party is financially responsible for remediation costs at a facility; (2) the respondent was liable for a release or threatened release of hazardous substances at the facility under RCW 70.105D.040; (3) "remedial action" was taken to address the release of hazardous substances; and (4) the remedial action was the substantial equivalent of actions that would have been taken by the Department. RCW 70.105D.080; *City of Seattle (Seattle City Light) v. Dep't of Transp.*, 98 Wn. App. 165, 175, 989 P.2d 1164 (1999).

A disputed issue in this case is whether environmental investigation of property owned by Respondents Harlan D. and Maxine H. Douglass was a "remedial action" under MTCA, when contamination at the property later proved to be at or below MTCA's regulatory cleanup

levels. As the agency charged with implementing MTCA, Ecology construes "remedial action" consistent with the plain language of MTCA to include any act to identify any threat or potential threat posed by a hazardous substance, or any investigative activities with respect to any release or threatened release of a hazardous substance, regardless of whether the contamination later proves to be at or below MTCA's regulatory cleanup levels. Ecology also writes to clarify that numeric cleanup levels alone should not be used to determine whether or not a "threat" or "potential threat" exists under MTCA.

A. The Model Toxics Control Act Includes Investigation Work as a "Remedial Action"

Petitioner Shamrock Paving, Inc., argues that investigative work can only be considered a "remedial action" if it identifies a hazardous substance that actually poses a threat or potential threat to human health or the environment. Following this argument, if investigative work later determines that the concentration of a hazardous substance is not a risk (e.g., below a MTCA cleanup level), then the work should not be considered a "remedial action." *See* Supplemental Brief of Petitioner Shamrock Paving, Inc. 4–6, 10–15. Ecology disagrees with this standard because it is inconsistent with the plain language of MTCA and conflicts with, rather than furthers, MTCA's policies and purposes.

1. Under MTCA's plain language, work to identify or investigate a hazardous substance is a "remedial action"

MTCA defines "remedial action" as:

> *[A]ny action* or expenditure consistent with the purposes of this chapter *to identify*, eliminate, or minimize *any threat or potential threat posed by hazardous substances* to human health or the environment *including any investigative and monitoring activities* with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

RCW 70.105D.020(33) (emphasis added).

Under this plain language, *any* action to identify any threat or potential threat posed by a hazardous substance or *any* investigative activities with respect to any release or threatened release of a hazardous substance are considered remedial actions. An investigation that identifies the type of hazardous substance released to the environment, determines the extent of that release, and also measures the concentration of the hazardous substance, fits within this description. It should thus be considered a remedial action.

Applying the plain language of the statute, Ecology has interpreted MTCA to provide it with the authority to require, through an administrative order, an investigation of the nature and extent of contamination (called a "remedial investigation") as one of the first

remedial actions conducted at a cleanup site.[3] *See* WAC 173-340-350. Typically, such an order will require a potentially liable person to submit and/or implement a remedial investigation work plan. The purpose of the remedial investigation is to collect, develop, and evaluate sufficient information regarding a site to select a cleanup action. *See* WAC 173-340-350(1). The investigation defines the presence and distribution of hazardous substances at the site. That information is then used to evaluate the risk posed by the hazardous substance.

For example, a key component of addressing a petroleum release is to characterize the area and vertical extent of soils impacted by the petroleum. This is because petroleum trapped in or absorbed onto the soil is a continuing source of groundwater contamination. *See* Department of Ecology, *Guidance for Remediation of Petroleum Contaminated Sites* 55 (June 2016) [hereinafter *Guidance*], https://fortress.wa.gov/ecy/publications/documents/1009057.pdf. Determining the boundaries of a release by necessity requires sampling until a clean or minimal amount of the hazardous substance is discovered. *See, e.g.*, *id.* at 58, 60 ("[b]orings

[3] Ecology often will perform a brief investigation at a property where there has been a reported release of a hazardous substance before entering into an administrative order to determine if the site needs further investigation, emergency cleanup, or no further action is required. *See* WAC 173-340-310 (describing an Initial Investigation) and WAC 173-340-320 (describing a Site Hazard Assessment).

should extend both horizontally and vertically until clean soils are encountered").

Where, as here, there has been a release of a hazardous substance, conducting an investigation to determine the extent and concentration of that release is an "action . . . to identify . . . any threat or potential threat posed by hazardous substances" under RCW 70.105D.020(33), without regard to whether the investigation's outcome ultimately shows a high or low concentration of the contaminant. Accordingly, such an investigation is also unambiguously an "investigative . . . activit[y] with respect to any release or threatened release of a hazardous substance" under RCW 70.105D.020(33). The Court of Appeals was correct in concluding that an action undertaken to identify whether a sample contains a hazardous substance is "remedial action" because its purpose is to "discern whether such a threat exists." *Douglass*, 196 Wn. App. at 858.

2. A narrow definition of "remedial action" could impede Ecology's authority, is inconsistent with MTCA's strict liability scheme, and will frustrate the purpose of MTCA

If adopted, Shamrock's position could impede Ecology's authority under MTCA. While MTCA expressly authorizes Ecology to require the investigation of releases or threatened releases of hazardous substances in one provision, *see* RCW 70.105D.030(1)(a), other key provisions of

MTCA frame Ecology's authority in terms of the scope of what constitutes "remedial action," including the provision vesting Ecology with the authority to issue administrative orders compelling such investigation.[4] *See* RCW 70.105D.050(1). Shamrock's interpretation of "remedial action," however, would create a conundrum in using this authority. Under Shamrock's interpretation, an investigation would be a remedial action only if the results of the investigation showed hazardous substances above cleanup levels. But the only way to tell if hazardous substances are above cleanup levels is to conduct an investigation. The only way to escape this conundrum and preserve the authority granted to Ecology in RCW 70.105D.050(1) is to interpret the scope of "remedial action" to include the act of investigation itself, regardless of whether it shows hazardous substances above cleanup levels. Once again, this interpretation is consistent with the plain language of MTCA.

Shamrock's position is also inconsistent with MTCA's strict liability scheme. Shamrock argues that the Court of Appeals' decision establishes a "strict liability approach [which] cannot be squared with the

[4] To cite other examples where the scope of Ecology's authority is defined by what constitutes "remedial action": Ecology's lien cost recovery authority is limited to the recovery of "remedial action" costs. *See* RCW 70.105D.055. Ecology's distribution of grant funds is limited to costs for "remedial action." *See* RCW 70.105D.070(3)(k), (q); RCW 70.105D.070(4). A MTCA exemption from certain procedural requirements applies only to "remedial actions." RCW 70.105D.090. Also expenditures from the cleanup settlement account and brownfield redevelopment trust fund may only be used to conduct "remedial actions." *See* RCW 70.105D.130, .140.

statute's plain language." Shamrock Suppl. Br. 12, 13. MTCA, however, "explicitly creates a scheme of strict liability and joint and several liability for those caught in its sweep." *Seattle City Light*, 98 Wn. App. at 170; *see also* RCW 70.105D.040(2) (establishing strict, joint, and several liability for all remedial action costs for each person who is liable under MTCA). This strict, joint and several liability scheme is broad by design, and it applies regardless of fault or intent. *See, e.g.*, *PacifiCorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App. 627, 658, 259 P.3d 1115 (2011) (no minimum level of hazardous substances required to trigger liability provisions under MTCA); *see also* 24 Timothy Butler & Matthew King, *Washington Practice: Environmental Law & Practice* § 15.2 (2d ed. 2007). The scheme is intentionally geared to get contaminated sites cleaned up "well and expeditiously" at the front end, as directed by Ecology, without delay from confounding litigation over who should ultimately bear the costs. RCW 70.105D.010(5); RCW 70.105D.060 (timing of review provision); Office of the Secretary of State, *Washington 1988 Voters & Candidates Pamphlet* 6 (1st ed. 1988), https://www.sos.wa.gov/_assets/elections/Voters'%20Pamphlet%201988.pdf ("*Cleanups, not lawsuits*. I-97 makes cleanups happen now—not later.").

Shamrock appears concerned that defendants not be forced to pay remedial action costs unless some minimum level of culpability has been established. Shamrock Suppl. Br. 13. Shamrock's concern, however, does not require defining "remedial action" in a way that will impede the investigation of hazardous waste sites. Instead, MTCA provides for a separate, private right of action to allow liable persons to pursue an equitable apportionment of costs among themselves. *See* RCW 70.105D.080; *Seattle City Light*, 98 Wn. App. at 174–75. It is during this contribution claim process that Douglass and Shamrock can (and did) make arguments related to whether or not the remedial actions undertaken were necessary to address a threat or potential threat from the hazardous substance. Indeed, during the allocation process a court may determine a party to be liable under MTCA, but not required to pay complete response costs, or even any response costs. *Seattle City Light*, 98 Wn. App. at 175–78 (in a contribution action brought by another liable person, state agency held liable under MTCA, but not responsible for any portion of cleanup costs).

Finally, Shamrock's interpretation would create significant confusion and delay in such cost recovery actions. Investigative work would be done at the site, and then the party seeking to recover its remedial action costs would need to sort out what work resulted in

identification of a risk (e.g., above a cleanup level) and what work did not. The vast majority of sites would have a variety of sample results ranging from above a cleanup level, to below a cleanup level, to clean. It would be very difficult for any party to parse out costs of individual samples from the overall costs of investigative work (e.g., mobilization, sampling, lab costs, disposal costs for contaminated materials, etc.). Shamrock's interpretation would serve as a disincentive for private parties to engage in investigative activities, contrary to MTCA's aim of cleaning up contaminated sites "well and expeditiously." RCW 70.105D.010(5).

B. A "Threat" or "Potential Threat" Is Not Only Related to a Cleanup Level, but Is a Site-Specific Determination

Douglass argues (1) that under the definition of "remedial action," a concentration of a hazardous substance above a cleanup level is an actual risk, while a concentration above a nominal amount but below the MTCA cleanup level is a "potential threat" or "potential risk" and (2) that any action to eliminate or minimize this "potential threat" should be considered a "remedial action." *See* Petitioners' [Douglass] Supplemental Brief 8–12. Ecology does not disagree with Douglass's argument but a numeric cleanup level is not the only indicator for determining if a hazardous substance constitutes a threat or potential threat to human health or the environment.

1. Determination of the "threat" or "potential threat" of a hazardous substance is a complex process and should not be simplified

A cleanup level is the concentration of a hazardous substance in a media (soil, surface water, groundwater, air, or sediment) that is determined to be protective of human health and the environment under specific exposure conditions. WAC 173-340-700(2). Establishing a cleanup level that reflects the risk at the site is not as simple as picking a number from a chart. It is a site-specific determination that requires identifying: the nature of the contamination, the potentially contaminated media, the current and potential pathways of exposure, the current and potential receptors, and the current and potential land and resource uses. WAC 173-340-700(5). MTCA typically uses three approaches for establishing cleanup levels, Method A, Method B, and Method C, which are defined in rule. WAC 173-340-700(5)(a)–(c); *see also Guidance*, *supra*, at 109. Each approach allows for a standard or modified use, depending on whether generic default assumptions are used or chemical-specific or site-specific information is used to change the default assumptions. *See*, *e.g.*, WAC 173-340-700(5)(b) (describing the two-tier approach of standard or modified Method B).

Establishing cleanup levels can become even more complex depending on the contaminant at issue. For example, Ecology has specific

procedures for setting cleanup levels at petroleum-contaminated sites. WAC 173-340-700(8). As Ecology has explained in a guidance document: "a direct comparison of these cleanup levels to the contaminant concentrations at the site may not be sufficient to demonstrate compliance . . . ." *Guidance*, *supra,* at 109. This is because additional factors beyond the numeric cleanup level could be applied to ensure the contaminant concentration is not a threat to human health or the environment. For example, knowledge of the site-specific TPH (total petroleum hydrocarbons) composition is required to determine if use of Method B (site-specific determination) instead of Method A (general standards used at simple sites) is necessary in setting cleanup levels. *Id.* at 111. Based on the composition of TPH, additional risk factors may need to be used in setting the cleanup level (thus necessitating use of Method B). Also, review of the risk created by a petroleum release will likely require additional assessments such as a terrestrial ecological evaluation to determine whether a release of hazardous substances to the soil may pose a threat to the terrestrial environment. WAC 173-340-7490(1); *Guidance*, *supra,* at 115.

When Ecology developed numeric cleanup levels, they were intended to represent a wide range of conditions to protect human health and the environment. However, those numeric cleanup levels could not

possibly take into account all hazardous substances or all the unique characteristics at a site that may affect toxicity such as vapor hazards or sediment impacts. In such cases, Ecology's MTCA rules allow for alternative approaches to assess the toxicity and "threat" of a hazardous substance. *See, e.g.*, Department of Ecology, *Sediment Cleanup Users Manual II*, at 4-2 to 4-14 (March 2015), https://fortress.wa.gov/ecy/publications/othersupplements/1209057other.pdf. Identifying if a hazardous substance poses a "threat" or "potential threat" at a specific site may be accomplished in many ways. It would be inappropriate to limit this determination to whether or not a hazardous substance concentration meets (or does not meet) a numeric cleanup level.

2. Determination of the "threat" or "potential threat" of a hazardous substance is not limited to a concentration, but may also need to address the mobility of the hazardous substance

A hazardous substance may be a considered a "threat" or "potential threat" if it is likely to mobilize and migrate. For example, Ecology may require a remedial action to take place for removal of contaminated solids in a storm drain. While the concentration of the hazardous substance in that one sample may not be above a cleanup level, it may still pose a potential threat if that contamination were to travel to a waterway and commingle with other deposits of the same contaminant. The

accumulation of a hazardous substance may then present a threat to human health or the environment. In such a case, to protect human health and the environment, Ecology could take action in response to the release of the hazardous substance even if the sample was below a cleanup level.

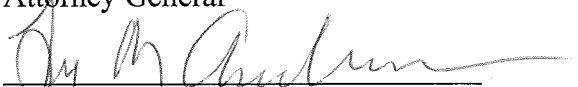
Given the complexity of evaluating a release of a hazardous substance and its "threat" or "potential threat" to human health and the environment, the determination cannot be limited to a simplistic statement related to whether or not the concentration is above or below a certain number.

VI. CONCLUSION

Consistent with the plain language of MTCA, the Court should interpret "remedial action" in RCW 70.105D.020(33) to include any act to identify any threat or potential threat posed by a hazardous substance or any investigative activity with respect to any release or threatened release of a hazardous substance. Likewise, the phrase "potential threat" in that statute should be given its plain meaning, not limited to a determination based solely on the relationship of the concentration of the hazardous substance to the cleanup level. Additional factors beyond the numeric cleanup level may need to be applied to ensure the hazardous substance concentration is not a threat or potential threat, to human health or the environment.

RESPECTFULLY SUBMITTED this 1st day of September 2017.

ROBERT W. FERGUSON
Attorney General



IVY M. ANDERSON
Assistant Attorney General
WSBA No. 30652
Attorneys for Amicus Curiae State of Washington, Department of Ecology

CERTIFICATE OF SERVICE

I certify that on September 1, 2017, I caused to be served the Amicus Curiae Brief of State of Washington, Department of Ecology in the above-captioned matter upon the parties herein via U.S. Mail and using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

Joseph P. Delay — rnarigail@dctpw.com
601 W. Main Ave., Suite 1212
Spokane, WA 99201-0684
509-455-9500

Steven J. Hassing — sjh@hassinglaw.com
425 Calabria Court
Roseville, CA 95747
916-677-1776
Attorneys for Harlan and Maxine Douglass

James A. McPhee — jmcphee@workwith.com
John T. Drake — jdrake@workwith.com
Witherspoon Brajcich McPhee, PLLC
601 West Main, Suite 714
Spokane, WA 99201
509-455-9077
Attorneys for Shamrock Paving, Inc.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of September 2017 at Olympia, Washington.

Danielle E. French

DANIELLE E. FRENCH
Legal Assistant

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

September 01, 2017 - 2:37 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94087-8
Appellate Court Case Title:	Harlan D. Douglass, et ux. v. Shamrock Paving, Inc.
Superior Court Case Number:	13-2-03886-7

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